IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY

WEDNESDAY, THE 28TH FEBRUARY 2007 / 9TH PHALGUNA 1928

CRL.A.No. 732 of 1999()

AGAINST THE ORDER IN CC.389/1998 of JUDL.MAGISTRATE OF FIRST CLASS-III, KOTTAYAM DT. 17.8.1999.

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APPELLANT: COMPLAINANT IN C.C. NO.389/98 OF THE JUDICIAL
---------- ------ 1ST CLASS MAGISTRATE'S COURT III, KOTTAYAM.

GIKKU GEORGE, PRINCE HOUSE,
ARUTHOOTTY, KOTTAYAM.

BY ADV. SRI.K.B.SURESH

RESPONDENTS: ACCUSED IN C.C. 389/98 OF THE JUDICIAL 1ST CLASS
---------- MAGISTRATE'S COURT – III, KOTTAYAM.

1. **SAJI ABRAHAM, IDIMALIYIL VEEDU,**
   KALLUMADA, AYMANAM P.O.,
   KOTTAYAM.

2. **STATE OF KERALA, REP.BY**
   THE PUBLIC PROSECUTOR,
   HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.K.C.SANTHOSHKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 28/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B.KOSHY, J.

Crl.Appeal No.732 OF 1999

Dated 28th February, 2007

JUDGMENT

This appeal is filed against an order of acquittal under section 256(1) of the Code of Criminal Procedure. The appellant filed a complaint under section 138 of the Negotiable Instruments Act contending that a cheque issued by the first respondent/accused was dishonoured for insufficiency of funds. The complainant was examined and court has taken cognizance and summons was issued to the accused, but, it was not served. Thereafter, warrants were issued. Before executing the warrant, in one of the posting dates (17.8.1999), since the complainant was absent, the accused was acquitted under section 256(1) Cr.P.C. The notice issued from this court was also not able to be served on the first respondent. Even though trial court has got power to acquit the accused for the absence of the complainant under section 256(1) Cr.P.C., it cannot be done mechanically. When the summons were not served on the accused and accused was absent, presence of the complainant was not mandatory. In this case, notice was not served on the accused and accused was not present. According to the appellant, his advocate suffered a heart attack and was

hospitalised. Therefore, he was unable to present in court on 17.8.1999 when accused was acquitted. In the above circumstances, acquittal of the accused was not warranted and hence the order of acquittal is set aside. The appellant/complainant shall appear before the trial court on 26.3.2007. Fresh steps should be taken to serve notice on the accused.

The appeal is allowed by way of remand.

J.B.KOSHY
Judge

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